# In the Supreme Court of the United States

October Term, 1977

No. 77-397



No. _____

ROBERT R. SCOTT, dba SLICK NICK'S,

*Appellant,*

*vs.*

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; AND ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## JURISDICTIONAL STATEMENT

Law Offices of
KENNETH P. SCHOLTZ
315 South Beverly Drive
Beverly Hills, California 90212
(213) 879-0157

*Attorneys for Appellant*
*Robert R. Scott, dba Slick Nick's*

Westside Law Publishers Santa Monica, California (213) 451-1714

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# In the Supreme Court of the United States

October Term, 1977

No._____

ROBERT R. SCOTT, dba SLICK NICK'S,

*Appellant,*

*vs.*

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; AND ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

*Appellees.*

## JURISDICTIONAL STATEMENT

### QUESTIONS PRESENTED

1. Has the decision in *California v. LaRue,* 409 U.S. 109 retained any validity after *Craig v. Boren,*——U.S.——, 97 S.Ct. 451?

2. May a state forbid holders of on-sale alcoholic beverages from presenting non-obscene nude dancing that is not alleged to violate any other valid law?

### STATEMENT OF THE CASE

On or about July 30, 1975, appellee Department of Alcoholic Beverage Control ("ABC") filed an accusation against appellant charging him with violating ABC Rules 143.3(2) and 143.3(1)(c) by permitting female entertainers to display their pubic hair and to expose their breasts, buttocks and pubic hair while "not on a stage removed at least 6 feet from the nearest patron." (Rule 143.3 appears in Appendix "A") On or about September 26, 1975, a supplemental accusation was filed charging further and similar violations of the same rules.

On May 20, 1976, following an administrative hearing, ABC adopted a proposed decision ordering suspension of appellant's on-sale beer license for a period of thirty days (a copy of the decision appears in Appendix "B").

On March 21, 1976, appellee Alcoholic Beverage Control Appeals Board filed its Opinion affirming said order of suspension (a copy of the decision of the Appeals Board appears in Appendix "C").

On April 20, 1977, appellant filed a Petition for Writ of Review and Stay Order in the Court of Appeal of the State of California, Second Appellate District. On April 28, 1977, said petition was denied without opinion (said notice appears in Appendix "D").

On May 5, 1977, appellant filed a Petition for Writ of Review and Stay Order in the Supreme Court of the State of California. On May 26, 1977, a hearing on said matter was denied (notice of said denial appears in Appendix "E").

## STATEMENT OF FACTS

John Schillin, an investigator with the Department of Alcoholic Beverage Control (hereinafter "Department"), visited appellant's premises on May 16, 1975, accompanied by Investigator Griffen (R.T. p. 5). Outside the premises were several signs relating to entertainment. One said "Slick Nick's Saloon, Continuous Dancing, Continuous Entertainment, Beer, Food, Pool." Another said "Exotic Nude Dancing, 5:00 p.m. to 1:00 a.m." (R.T. p. 6).

Mr. Schillin was charged $2.00 to enter (R.T. p. 6).

Mr. Schillin described the interior as having a stage approximately one and one-half feet tall (R.T. p. 7). At the time he entered, a female named Nicole was dancing nude on the stage. She came to within three to six feet of the patrons seated around the stage (R.T. p. 8).

Mr. Schillin did not actually take any measurements in the premises. The seats around the bar were regular steel



theatre seats and were affixed to the floor (R.T. p. 23).

After a short break, Nicole returned to the stage and danced to some eleven or twelve songs. During the last five songs she was completely nude and during parts of those dances came to within three to six feet of the customers seated around the stage (R.T. p. 9).

The next dancer was Bonnie Lou Dorothy Davis, who danced to some thirteen songs. She was nude during the last six to seven songs and on occasion danced within three to six feet of the patrons seated around the stage (R.T. p. 10).

On August 21, 1975, Mr. Schillin returned to Slick Nick's with Investigator Barnes. The premises were essentially the same. On this occasion Schillin advised appellant at the time of entry that they were conducting an investigation (R.T. pp. 12-13).

Two dancers performed that evening; Patricia Louise Trammell and Kathleen Mary Ryan. Miss Ryan danced with her breasts exposed while Miss Trammell danced nude. Miss Trammell came to within three to six feet of patrons while nude (R.T. pp. 14-15).

On August 28, 1975, Mr. Schillin again went to Slick Nick's with Investigator Barnes and they identified themselves to appellant (R.T. p. 17). Two dancers were performing. Patricia Trammell, who was wearing a pantsuit, and Joan Irene Gaudet, who was nude. Miss Gaudet came within four to six feet of patrons while dancing (R.T. p. 18). Later Miss Trammell also danced nude, after Miss Gaudet had left the stage, and she also danced within four to six feet of customers seated around the stage (R.T. pp. 18-20).

Appellant Robert Scott testified that he began presenting nude entertainment in April, 1975. Prior to doing so, he installed theatre seats, erected a turnstile for admittance, and posted a sign stating the type of entertainment offered. The stage was completely rebuilt.

Since April, 1975, nude entertainment has been the

prime purpose of the business and the prime attraction to the customers (R.T. p. 78).

Waitresses are instructed to meet entering customers, ask for their ticket, assist them to a seat, and to ask if they can be of further assistance. They are not to bother a customer unless he asks for a refill, but they may empty an ashtray. Tickets have been issued at the door since they began bottomless (R.T. p. 83).

## ARGUMENT

### A.B.C. RULE 143.3 UNCONSTITUTIONALLY IMPINGES ON FREE SPEECH IN VIOLATION OF THE FIRST AMENDMENT BY PROHIBITING NON–OBSCENE ENTERTAINMENT BY NUDE DANCERS.

In *California v. LaRue* (1973) 409 U.S. 109, 93 S. Ct. 390, 34 L.Ed. 2d 342, this Court upheld Rule 143.3, recognizing that the rule reached performances that were "within the limits of the constitutional protection of the freedom of expression" (409 U.S. at 118), but that its validity was established because the Twenty-First Amendment "strengthened" the validity of the rules or provided an "added presumption" of their validity.

The opposite conclusion, however, was reached by this Court in *Craig v. Boren*, 97 S.Ct. 451 (decided December 20, 1976), in which it held invalid on equal protection grounds an Oklahoma statute which permitted women to buy beer at a younger age than men.

This Court in *Boren* expressly rejected the proposition that the state law was "strengthened" by the Twenty-First Amendment. The opinion said:

> "The Twenty-First Amendment repealed the Eighteenth Amendment in 1933. The wording of §2 of the Twenty-First Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framer's clear intention of constitutionalizing the Commerce Clause framework established under



those statutes. The court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. See, e.g., *Hostetter v. Idlewild Bon Voyage Liquor Corp.* (1964) 377 U.S. 324, 330; *Carter v. Virginia* (1944) 321 U.S. 131, 139-140 (Frankfurter, J., concurring); *Finch & Co. v. McKittrick* (1939) 305 U.S. 395, 398. Even here, however, the Twenty-First Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.' *Hostetter v. Idlewild Bon Voyage Liquor Corp., supra,* 377 U.S. at 332, cf. *Department of Revenue v. James B. Beam Distilling Co.* (1964) 377 U.S. 341; *Collins v. Yosemite Park & Curry Co.* (1938) 305 U.S. 518.

"On passing beyond the consideration of the Commerce Clause, the relevance of the Twenty-First Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked, '[n]either the text nor the history of the Twenty-First Amendment suggests that it qualifies individual rights protected by the Bill of Rights and Fourteenth Amendment where the sale or use of liquor is concerned.' *P. Best, Processes of Constitutional Decisionmaking* 258 (1975). Any departure from this historical view has been limited and sporadic. Two states successfully relied upon the Twenty-First Amendment to respond to challenges of major liquor importers to state authority to regulate the importation and manufacture of alcoholic beverages on Commerce Clause and Fourteenth Amendment grounds. See *Mahoney v. Joseph Triner Corp.* (1938) 304 U.S. 401; *State Board v. Youngs Mar-*

*ket Co.* (1936) 299 U.S. 59. 64. In fact, however, the arguments in both cases centered upon importation of intoxicants, a regulatory area where the State's authority under the Twenty-First Amendment is transparently clear; *Hostetter v. Idlewild Bon Voyage Liquor Corp., supra,* 377 U.S. at 330 and n. 9, and touched upon purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment, see e.g. *Joseph E. Seagram & Sons v. Hostetter* (1966) 384 U.S. 35, 47-48, 50-51 (rejecting Fourteenth Amendment objections to state liquor laws on the strength of *Ferguson v. Skrupa* (1963) 372 U.S. 726, 729-730; and *Williamson v. Lee Optical Co.* (1955) 348 U.S. 483). Cases involving individual rights protected by the due process clause have been treated in sharp contrast. For example, when an individual objected to the mandatory 'posting' of her name in retail liquor establishments and her characterization as a "excessive drink[er],' the Twenty-First Amendment was held not to qualify the scope of her due process rights. *Wisconsin v. Constantineau* (1971) 400 U.S. 433, 436.

" 'It is true that *California v. LaRue* (1972) 409 U.S. 109, 115, relied upon the Twenty-First Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication.' id at 118. Nevertheless, the court has never recognized sufficient 'strength' in the Amendment to defeat an otherwise established claim of invidious discriminations that violate the Equal Protection Clause.' " Rather, *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, 178-179, establishes that state liquor regulatory schemes cannot work invidious discriminations that violate



the Equal Protection Clause.' " *Craig v. Boren, supra,* 97 S.Ct. at pp. 461-462.

"Although *Craig v. Boren* does not overrule *LaRue,* it places it on a limb with 'limited and sporadic' departures from the historical view that the Twenty-First Amendment is essentially limited to validating state laws which invade the Commerce Clause. *Craig v. Boren* substantially changed the court's interpretation of the three cases it had relied upon in *LaRue: Hostetter v. Idlewild Bon Voyage Liquor Corp.* (1964) 377 U.S. 324; *Joseph E. Seagrams & Sons v. Hostetter* (1966) 384 U.S. 35; *and State Board v. Young's Market Co.,* 299 U.S. 59. In *Craig,* the first of these cited cases was said to confirm the limitation of the Twenty-First Amendment to Commerce Clause cases had to merely provide a countervailing, rather than an overruling, constitutional principle. The second of the three cases was said to involve only a due process challenge to a state economic regulation. The dictum in the third case, which had been quoted in *LaRue,* was limited in footnote 21, to classifications expressly recognized by the Twenty-First Amendment, those classifications being the 'transportation and importation' of intoxicating liquor from one state into another for delivery or use therein.

"The absence of any underlying support for *LaRue's* interpretation of the Twenty-First Amendment had been commented upon in Law Review articles published prior to the decision in *Craig v. Boren.* Thus, in a review of the decisions of Justice Rehnquist, who wrote the majority opinion in *LaRue,* Professor David L. Shapiro of Harvard Law School says of the Opinion:

> " 'Justice Rehnquist points to nothing in the language of the amendment, and indeed there is nothing, even remotely suggesting that a state may condition a liquor license on the licensee's agreement not to engage in conduct otherwise protected by the First and Fourteenth Amendments. All the

Twenty-First Amendment does is prohibit *importation* of liquor into a state, thus assuring that efforts by such states to prevent importation will not run afoul of the Commerce Clause. Nor does Justice Rehnquist cite one work of legislative history of the amendment, a failure that is not surprising since that history is wholly consistent with its language: to guarantee to the states that any restrictions on importation of liquor will not be invalidated as a usurpation of Federal power over commerce.' " *Shapiro, "Mr. Justice Rehnquist: A Preliminary View,"* 90 Harv. L.R. 293, 305 (1976).

"Another commentator concluded, after reviewing the Opinion in detail:

" 'It is, therefore, not surprising that Justice Rehnquist in *California v. LaRue* raised the issue of 'an added presumption of validity' in the area of liquor legislation. Yet nothing in the history of this field would suggest that the 'presumption' is applicable, *except* where liquor regulations are challenged under the Commerce Clause. The Court's attempt in *California v. LaRue* to extend the 'presumption of validity' to liquor legislation which has nothing to do with the Commerce Clause is neither justified by the Twenty-First Amendment nor by those cases which have interpreted the Amendment.' " 7 *Urban Law Annual,* 421, 429 (1974).

A restrictive view of the Twenty-First Amendment, that is essentially the same as the one reaffirmed in *Craig v. Boren* was adopted by the California Supreme Court in *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal. 3d 1, 11-12, 95 Cal. Rptr. 329, 335.



In the appeal of Darcly, Inc. AB-4337, the Appeals Board attempted to distinguish *Boren* from *LaRue* on the grounds that *Boren* involved individual rights while *LaRue* involved regulation of licensed premises. (Opinion, p. 14). This is no distinction at all. Both cases involve both issues and both cases involve the question of whether the state's power to control individual rights is 'strengthened' by the Twenty-First Amendment, but came to opposite results.

The Board made no attempt to rationally reconcile the two cases. Appellant Robert Scott contends that no rational reconciliation is possible. This Court has eroded whatever slim basis existed for its decision in *LaRue, supra,* and in order to preserve the rationale of *Craig v. Boren, supra, LaRue* must be overturned.

## CONCLUSION

For the reasons stated it is respectfully submitted that appellant's license suspension be reversed.

Respectfully submitted,

Law Offices of
KENNETH P. SCHOLTZ
315 South Beverly Drive
Beverly Hills, California 90212
(213) 879-0157
*Attorneys for Appellant*
*Robert R. Scott, dba Slick Nick's*

# APPENDIX

**143.3. Entertainers and Conduct.** Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

NOTE: Authority cited: Section 25750, Business and Professions Code and Section 22 of Art. XX, Calif. Constitution. Reference: Sec. 23001, Bus. & Prof. Code.

*History:* 1. New section filed 7-9-70; designated effective 8-10-70 (Register 70, No. 28).

EXHIBIT A

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

File **64421**

Reg. **3998**

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by a Hearing Officer of the Office of Administrative Procedure, adopted said proposed decision as its decision in the case therein described on **May 20, 1976.**

A representative of the Department will call on you on or after **July 8, 1976,** to pick up the license certificate.

Sacramento, California
Dated: **May 20, 1976**

**Beatrice Smalley**
Hearing and Legal Unit

**EXHIBIT B**



**BEFORE THE**

**DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL**

**OF THE STATE OF CALIFORNIA**

RECEIVED
JUN 17 1977
KENNETH P. SCHOLTZ

IN THE MATTER OF THE Accusation Against

Robert R. Scott
Slick Nick's Saloon
13055 E. Valley Blvd.
La Puente

on-sale beer conditional license

respondent
under the Alcoholic Beverage Control Act.

FILE 64421
REG. 3998

NOTICE AFTER APPEALS BOARD DECISION

The Alcoholic Beverage Control Appeals Board having affirmed the decision of the Department of Alcoholic Beverage Control in the above matter and the Supreme Court having denied hearing therein, the decision of the Department dated May 20, 1976 is now final.

A representative of the Department will call on you on or after June 24, 1977 to pick up the license certificate.

Sacramento, California
Dated: June 14, 1977

C. E. Cameron, Jr.
C. E. CAMERON, JR.
CHIEF COUNSEL

**EXHIBIT C**

STATE OF CALIFORNIA

# DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

First Amended
IN THE MATTER OF THE / Accusation
Against:

SCOTT, ROBERT R.
dba SLICK NICK'S SALOON
13065 E. Valley Boulevard
La Puente, California 91746

On Sale Beer (Food)

Respondent.

Polios: 350

File 64421
Reg. 3998

Licenses:

Time of Hearing: December 30, 1975

Place of Hearing: 314 West First Street
Los Angeles, California

Reporter: Patrick Patterson L-10094

Appearances:
For Dept: Doris Jaffe, Counsel
For Resp: Kenneth P. Scholtz, Atty.
315 S. Beverly Dr., Ste. 406
Beverly Hills, California 9021



under the Alcoholic Beverage Control Act.

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having been given according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.



## PROPOSED DECISION

FINDINGS OF FACT:

COUNT I

On or about May 16, 1975, the above-named on-sale licensee did permit Bonnie Lou Dorothy Davis to perform acts in the above-designated on-sale licensed premises, at which time said Bonnie Lou Dorothy Davis did display her pubic hair.

COUNT II

On or about May 16, 1975, the above-named on-sale licensee did permit an unidentified female dancer, whose first name is known only as "Nichole", to perform acts in the above-designated on-sale licenses premises, at which time said female dancer did display her pubic hair.

COUNT III

On or about May 16, 1975, the above-named on-sale licensee did permit entertainers Bonnie Lou Dorothy Davis and an unidentified female dancer whose first name is known only as "Nichole,", to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least 6' from the nearest patron.

COUNT IV

On or about August 21, 1975, the above-named on-sale licensee did permit Patricia Louise Trammell to perform acts in the above-designated on-sale licensed premises, at which time said Patricia Louise Trammell did display her pubic hair.

COUNT V

On or about August 21, 1975, the above-named on-sale licensee did permit Kathleen Mary Ryan to perform acts in the above-









designated on-sale licensed premises, at which time said Kathleen Mary Ryan did display her pubic hair.

COUNT VI

On or about August 21, 1975, the above-named on-sale licensee did permit entertainers Patricia Louise Trammell and Kathleen Mary Ryan to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least 6' from the nearest patron.

COUNT VII

On or about August 28, 1975, the above-named on-sale licensee did permit Patricia Louise Trammell to perform acts in the above-designated on-sale licensed premises, at which time said Patricia Louise Trammel did display her pubic hair.

COUNT VIII

On or about August 28, 1975, the above-named on-sale licensee did permit Joan Irene Gaudet to perform acts in the above-designated on-sale licensed premises, at which time said Joan Irene Gaudet did display her pubic hair.

COUNT IX

On or about August 28, 1975, the above-named on-sale licensee did permit entertainers Patricia Louise Trammell and Joan Irene Gaudet to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least 6' from the nearest patron.

COUNT X

On or about May 24, 1974, the above-described alcoholic beverage license was issued to the respondent-licensee for the above-designated premises, subject to the following conditions:

That the petitioner shall not permit the following conduct or acts upon the licensed premises:

(1) Employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

(2) Employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

(3) Encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

(4) Permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breasts, genitals, anus, pubic hair or any portion thereof.

(5) Permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(6) Subject to the provisions of subdivision (5) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

(7) Permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

(8) Permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

(9) Permit the showing of film, still pictures, electronic reproduction; or other visual reproductions depicting:

(a) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

(c) Scenes wherein a person displays the vulva or the anus or the genitals.

(d) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

The foregoing conditions duplicate language contained in rules 143.2, 143.3, and 143.4. Although respondent, by virtue of the matters set forth in the findings as to Counts I through IX, violated the conditions, the conduct is not an independent cause for discipline.

FINDINGS RE PREVIOUS LICENSE RECORD:

Licensed as above since May 24, 1974 with the following record of disciplinary action: Reg. #02896, dated 3/21/75 for violation of 25607, 647(f) P.C. Decision pending.







DETERMINATION OF ISSUES PRESENTED:

1. Respondent violated rule 143.3, subdivision (1)(c), as to Counts I, II, IV, V, VII and VIII.

2. Respondent violated Rule 143.3, subdivision (2), as to Counts III, VI, and IX.

3. Grounds for the suspenion or revocation of respondent's license were established pursuant to subdivisions (a) and (b) of the Business and Professions Code and Article XX, Section 22 of the California Constitution as to Counts I through IX.

4. No cause for discipline was established as to Count X.

PENALTY OR RECOMMENDATION:

1. The license is suspended for thirty (30) days on each of Counts I through IX, separately and severally, said suspension to run concurrently for a total suspension of thirty (30) days.

2. Count X is dismissed.

Dated at Los Angeles, California February 19, 1976

Philip V. Sarkisian

PHILIP V. SARKISIAN
Administrative Law Judge
Office of Administrative Hearings

PVS:mh

Los Angeles, Cal. , 19____

TITLE { Scott / Dept of A.B.C. } No. 50967

THE COURT: Petition for writ of review denied.

RECEIVED

MAY 2 1977.

KENNETH P. SCHOLTZ

CLAY ROBBINS, *Clerk*

39486-112 5-76 8M ⓑ OSP

**EXHIBIT D**



CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 26 1977

*I have this day filed Order*

RECEIVED

JUN 1 1977,

KENNETH P. SCHOLTZ

*In re:* 2 Civ. *No.* 50967

Scott

*vs.*

Dept. of Alcoholic Beverage Control, et al.

*Respectfully,*

G. E. BISHEL
*Clerk*

42536-877 5-76 3M OSP

**EXHIBIT E**

# In the Supreme Court of the United States

October Term, 1977

No. 77-397



77-397

ROBERT R. SCOTT, dba SLICK NICK'S,

*Appellant,*

*vs.*

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; AND ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## APPENDIX TO JURISDICTIONAL STATEMENT

Law Offices of
KENNETH P. SCHOLTZ
315 South Beverly Drive
Beverly Hills, California 90212
(213) 879-0157

*Attorneys for Appellant*
*Robert R. Scott, dba Slick Nick's*

Westside Law Publishers Santa Monica, California (213) 451-1714

# INDEX
# TO SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

# In the Supreme Court of the United States

October Term, 1977

No. 77-397

ROBERT R. SCOTT, dba SLICK NICK'S,

*Appellant,*

*vs.*

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; AND ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

*Appellees.*

## APPENDIX TO JURISDICTIONAL STATEMENT

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

| | |
|---|---|
| In the Matter of the Accusation<br><br>Against<br><br>ROBERT R. SCOTT<br>dba Slick Nick's Saloon<br>13065 East Valley Boulevard<br>La Puente, California<br><br>Respondent & Licensee<br><br>On-sale beer conditional license<br><br>Under the Alcoholic Beverage Control Act. | AB-4320<br>File No. 64421; Reg No. 3998<br>ALJ: Sarkisian<br><br>Date and Place of Hearing:<br>February 23, 1977<br>314 West First Street<br>Los Angeles, California<br><br>For Department:<br>Honorable Evelle J. Younger<br>Attorney General<br>John J. Crimmins<br>Deputy Attorney General<br><br>For Appellant:<br>Kenneth P. Scholtz, Esq. |

Appellant Robert R. Scott, doing business as Slick Nick's Saloon, has appealed a decision of the Department of Alcoholic Beverage Control which determined that appellant violated Section 143.3, subdivision (1)(c), of Title 4 of the California Administrative Code as to Counts I, II, IV, V, VII and VIII; that appellant violated Section 143.3, subdivision (2) of said code as to Counts III, VI and IX; and, that grounds for the suspension or revocation of appellant's license were established pursuant to subdivisions (a) and (b) of the Business and Professions Code and Article XX, Section 22 of the California Constitution as to Counts I through IX. As a penalty, it was ordered that appellant's







license be suspended for thirty days on each of Counts I through IX, separately and severally, said suspension to run concurrently for a total suspension of thirty days. Count X was dismissed.

The department's decision further provides:

"FINDINGS OF FACT:

"COUNT I

"On or about May 16, 1975, the above-named on-sale licensee did permit Bonnie Lou Dorothy Davis to perform acts in the above-designated on-sale licensed premises, at which time said Bonnie Lou Dorothy Davis did display her pubic hair.

"COUNT II

"On or about May 16, 1975, the above-named on-sale licensee did permit an unidentified female dancer, whose first name is known only as "Nichole", to perform acts in the above-designated on-sale licenses [sic] premises, at which time said female dancer did display her pubic hair.

"COUNT III

"On or about May 16, 1975, the above-named on-sale licensee did permit entertainers Bonnie Lou Dorothy Davis and an unidentified female dancer whose first name is known only as "Nichole,", to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least 6' from the nearest patron.

"COUNT IV

"On or about August 21, 1975, the above-named on-sale licensee did

permit Patricia Louise Trammell to perform acts in the above-designated on-sale licensed premises, at which time said Patricia Louise Trammell did display her pubic hair.

"COUNT V

"On or about August 21, 1975, the above-named on-sale licensee did permit Kathleen Mary Ryan to perform acts in the above-designated on-sale licensed premises, at which time said Kathleen Mary Ryan did display her pubic hair.

"COUNT VI

"On or about August 21, 1975, the above-named on-sale licensee did permit entertainers Patricia Louise Trammell and Kathleen Mary Ryan to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least 6' from the nearest patron.

"COUNT VII

"On or about August 28, 1975, the above-named on-sale licensee did permit Patricia Louise Trammell to perform acts in the above-designated on-sale premises, at which time said Patricia Louise Trammel [sic] did display her pubic hair.

"COUNT VIII

"On or about August 28, 1975, the above-named on-sale licensee did permit Joan Irene Gaudet to perform acts in the above-designated on-sale licensed premises, at which time said Joan Irene Gaudet did display her pubic hair.

"COUNT IX

"On or about August 28, 1975, the above-named on-sale licensee did permit





entertainers Patricia Louise Trammell and Joan Irene Gaudet to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least 6' from the nearest patron.

"COUNT X

"On or about May 24, 1974, the above-described alcoholic beverage license was issued to the respondent-licensee for the above-designated premises, subject to the following conditions:

"That the petitioner shall not permit the following conduct or acts upon the licensed premises:

"(1) Employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

"(2) Employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.

"(3) Encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

"(4) Permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breasts, genitals, anus, pubic hair or any portion thereof.

"(5) Permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva or genitals.

"(6) Subject to the provisions of subdivision (5) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

"(7) Permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"(8) Permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"(9) Permit the showing of film, still pictures, electronic reproduction; or other visual reproductions depicting:

"(a) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality,







oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

"(c) Scenes wherein a person displays the vulva or the anus or the genitals.

"(d) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

"The foregoing conditions duplicate language contained in rules 143.2, 143.3, and 143.4. Although respondent, by virtue of the matters set forth in the findings as to Counts I through IX, violated the conditions, the conduct is not an independent cause for discipline.

"FINDINGS RE PREVIOUS LICENSE RECORD:

"Licensed as above since May 24, 1974 with the following record of disciplinary action: Reg. #02898, dated 3/21/75 for violation of 25607, 647(f) P.C. Decision pending."

This appeal is based upon all the grounds available under Business and Professions Code section 23084.

John Ellis Schillin, a Department Special Investigator, testified for the department that he entered respondent's premises on May 16, 1975 accompanied by Investigator Griffin. He was charged $2.00 to enter (R. T. 6). He described the stage therein as approximately one-and-one-half feet high, with a two-and-one-half foot wide bar separating the patrons

from the stage. A person identified as Nichole danced totally nude on the stage. Her pubic hair was fully exposed to view. She care within three feet of the patrons seated about the stage (R. T. 8). Subsequently, one Bonnie Lou Dorothy Davis danced on the stage nude, with the exception of boots. Her pubic hair was fully exposed to view (R. T. 10). She also danced within three feet of the nearest patrons seated about the stage (R. T. 10).

On August 21, 1975 Investigator Schillin again entered the subject premises with Investigator Barnes. The interior of the premises was not any different than as depicted in his May 16, 1975 testimony. He observed one Patricia Louise Trammell perform nude on the stage, exposing her pubic hair. He also observed one Kathleen Mary Ryan dance totally nude before patrons and expose her pubic hair (R. T. 14 - 15). Ms. Trammell danced within three feet of the patrons seated about the stage.

On August 28, 1975 he again entered the subject premises with Investigator Barnes. The interior of the premises was the same as previously testified to, supra. They again observed Ms. Trammell dancing on the stage, within four feet of the nearest patrons, in a state of total nudity (R. T. 20). On that date, he also observed one Joan Irene Gaudet dancing on the stage totally nude, with her pubic hair fully exposed to view (R. T. 18). She danced within four feet of the nearest patrons.







He observed the seats around the bar near the stage were theater-type seats, to the best of his recollection, which were affixed to the floor (R. T. 23). He testified the seats were approximately two-and-one-half to three feet from the bar itself, but patrons could lean forward and put their elbows and torsos upon the bar counter. He observed some patrons leaning forward on the bar counter and touching it with their bodies (R. T. 28). On May 16, 1975 he observed both Nichole and Davis pick up U. S. currency from the bar while still on the stage in a state of undress (R. T. 26 - 27).

Lloyd Griffin, a Department Special Investigator, next testified for the department. He stated that on May 16, 1975 the seats around the bar next to the stage were approximately two feet from the edge of the bar, and the bar was approximately two to three feet wide. He observed some of the patrons leaning forward in the seats so their arms or elbows were on top of the bar. He observed a performer on the stage being approximately three feet from the nearest patron. He observed Nichole and Davis dance upon the stage completely nude (R. T. 50 - 51). While nude, both ladies retrieved U. S. currency from the bar along the stage, coming within three to four feet of the nearest patrons.

Leslie Eugene Barnes, a Department Special Investigator, testified with regard to May 16, 1975. He made a rough sketch of the premises while therein, which was not drawn to scale (Department's Exhibit 1). He examined the chairs around

the bar counter next to the stage and estimated they were approximately two feet from the bar counter which was on the edge of the stage (R. T. 59), and that the bar counter is approximately two feet wide (R. T. 59). The stage itself runs underneath the bar counter approximately one foot (R. T. 59).

On August 21, 1975 he again entered the subject premises and observed Ryan and Trammell dancing completely nude and approaching the bar stage, with their shins almost touching the bar counter. He observed them seize the bar counter with their hands. (R. T. 60 - 61.)

He also visited the subject premises on August 28, 1975 and observed Gaudet and Trammell dance completely nude (R. T. 63); Trammell danced within three feet of the nearest patrons, some of whom were leaning on the bar counter (R. T. 64). He estimated the distance from the seats to the edge of the bar was approximately two feet, measuring from the back portion of the seat, and that people could put their feet underneath the bar (R. T. 66 - 67). He testified, inter alia:

> "Q Is it your estimate, then, that the distance between the front of the bar counter -- strike that. Is it your estimate that the aisle width between the front of the bar counter and an open chair is only six inches to one foot?





> "A Well, if the chairs are up, it's about a foot. I remember when I walked between there, I had to turn sideways. It was difficult to walk straight in between the two.
>
> "Q So your estimate is about -- it's a good six inches to one foot when the chairs are not open.
>
> "A Yes, sir."
>
> (R. T. 67:5 - 14.)

In addition to the other exhibit previously mentioned, the Department also introduced a copy of the licensee's license, Notice of License Correction, as well as a Petition for a Conditional License (Department's Exhibit 2); the licensee's previous history (Department's Exhibit 3); and the previous history of the subject premises with regard to Department violations (Department's Exhibit 4).

Robert Richard Scott, the respondent, testified as a witness in his own behalf. He testified that he had been presenting nude entertainment at the subject premises for approximately one month prior to the date of the first violation alleged in the accusation (May 16, 1975). The stage was rebuilt and the bar itself was widened to three feet. The seats were installed to measure six feet from the inside of the bar area to the back of the seat (R. T. 77). He testified he measured the distance from the seats to the stage, and that the back of the seat to the beginning of the stage

measured 72 inches (R. T. 77). With the seat down, the distance to the edge of the bar from the edge of the seat is approximately a foot to a foot-and-a half (R. T. 84), and he has observed his patrons leaning from the seats onto the bar around the stage (R. T. 84 - 85). He further testified with regard to the theater status of the subject premises (R. T. 77 - 83). He was aware of the department's rule against nude dancing when he initiated nude dancing in the subject premises (R. T. 84).

Respondent introduced two exhibits: Los Angeles County ordinance vis-a-vis indecent exposure in public places, showing an exception for theaters (Respondent's Exhibit A); and a copy of a preliminary injunction issued by the Superior Court for the County of Los Angeles vis-a-vis enforcement of the county ordinance by local police officials during the pendency of an action (Respondent's Exhibit B).

Upon appeal appellant contends: the evidence does not establish a violation of the six foot rule since the seats were six feet from the stage; and rule 143.3 has been preempted by sections 318.5 and 318.6 of the Penal Code, which permits nude dancing in theaters, concert halls and similar establishments primarily devoted to theatrical entertainment.

Appellant's contention that no violation of the six foot rule was proved as to Counts III, VI and IX is devoid of merit. The testimony of the department investigators indicate the dancers came within three to four feet of patrons. There was no showing that the patrons were doing anything





unusual, in the way of reaching, while seated at the bar surrounding the stage. The facts also established that the stage was less than six feet from the nearest patron. Hence, a violation of Section 143.3 occurred.

Appellant's contention that Rule 143.3 has been preempted by Penal Code sections 318.5 and 318.6 is devoid of merit. The preemption argument vis-a-vis 318.5 and 318.6 of the Penal Code has been laid to rest by the District Court of Appeal decision in Kirby v. Alcoholic Bev. Control Appeals Bd. & 552 Broadway, Inc., et al., 47 Cal.App.3d 360, wherein the District Court of Appeal reviewed Crownover v. Musick, 9 Cal.3d 405, and decided that the State Legislature's grant of authority to local governments with regard to the regulation of attire of waiters and entertainers in public premises under Penal Code sections 318.5 and 318.6 did not preempt Department Rule 143. The Court further stated: "Since the rule was promulgated pursuant to the department's constitutional authority to regulate the sale of drinks in premises it licenses, no issue of preemption is involved." (At p. 366.) We also note a review of Kirby was denied by the California Supreme Court on June 19, 1975. Furthermore, we are here concerned with an administrative rule rather than a penal code provision.

Appellant's apparent further contention, that Crownover, supra, clearly establishes that regulation of attire by waitresses, waiters, and entertainers is a matter

of local control and not within the scope of the department's licensing authority was also laid to rest in Kirby, supra, when it stated: "Thus, we conclude Rule 143.3, promulgated by the department pursuant to its exclusive power to license and regulate the sale of alcoholic beverages in this state under article XX, section 22, does not conflict with sections 318.5 and 318.6 of the Penal Code, which merely permit cities and counties to adopt penal ordinances regulating 'topless' and 'bottomless' exposure in establishments serving food or beverages and other public places. (Crownover v. Musick, supra, pp. 416 - 418.)"

The fact that the premises may be licensed as a theater does not deprive the department of authority to enforce its rules; it still remains a premises licensed by the department.

The evidence supports the findings and the findings support the department's decision. The department's decision is affirmed.

PETER M. FINNEGAN, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Patricia Wilkey
Eugene V. Lipp





2nd CIV. NO.
5 0 9 6 7

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

ROBERT R. SCOTT,
dba SLICK NICK'S,

Petitioner,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA and
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

Respondents.

NOTICE OF APPEAL

KENNETH P. SCHOLTZ
Attorney at Law
315 S. Beverly Drive, Suite 406
Beverly Hills, California 90212
213 556-3428, 879-0157

Attorney for Petitioner

**EXHIBIT G**

2ND CIV.
50967

COURT OF APPEAL

STATE OF CALIFORNIA

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ROBERT R. SCOTT
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DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

Respondents.

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## NOTICE OF APPEAL

TO THE RESPONDENTS in the above-entitled case:

PLEASE TAKE NOTICE that Petitioner, Robert R. Scott hereby appeals to the United States Supreme Court from the order of the Court of Appeal denying the Petition for Writ of Review.

Dated: July 20, 1977

KENNETH P. SCHOLTZ
Attorney for Petitioner

IN THE

# Supreme Court of the United States

October Term, 1977
No. 77-397

ROBERT R. SCOTT, dba SLICK NICK'S,

*Appellant,*

*vs.*

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

*Appellees.*

**On Appeal From the Court of Appeal of the State of California**

## BRIEF FOR THE APPELLEES

EVELLE J. YOUNGER, *Attorney General of the State of California,*

MARILYN K. MAYER,
*Deputy Attorney General,*

800 Tishman Building,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 736-2258,

*Attorneys for Appellees.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

## SUBJECT INDEX

## TABLE OF AUTHORITIES CITED

### Cases



### Statutes

IN THE

# Supreme Court of the United States

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ROBERT R. SCOTT, dba SLICK NICK'S,

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*Appellees.*

**On Appeal From the Court of Appeal of the State of California**

## BRIEF FOR THE APPELLEES

APPELLEES DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA AND ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD move to dismiss the instant action on the following grounds:

1. Appellant has failed to raise a substantial federal question;

2. The issues raised by appellant has been expressly decided by this court; and

3. The case is moot.

## Questions Raised

1. Has the decision in *California v. LaRue* (1972) 409 U.S. 109 [34 L.Ed.2d 342, 93 S.Ct. 390] retained validity after *Craig v. Boren* (1976) 429 U.S. 190 [50 L.Ed.2d 397, 97 S.Ct. 451]?

2. May a state forbid holders of on-sale alcoholic beverage licenses from presenting non-obscene nude dancing that does not violate any law?

3. Should this court decide a moot question?

## Statement of the Case

By an Accusation dated July 30, 1975, appellant was charged with three counts, all occurring on May 16, 1975, of permitting persons on the on-sale licensed premises to display their breasts, buttocks, and pubic hair to the view of patrons, which entertainers were on a stage not removed at least six feet from the nearest patron. It was charged that the continuance of the above-designated license would be contrary to public welfare and morals within the meaning of Article XX, section 22 of the Constitution of the State of California, and Business and Professions Code section 24200(a), in that on or about May 24, 1974, appellant was issued an alcoholic beverage license subject to the following conditions:

> "That the petitioner [appellant herein] shall not permit the following conduct or, acts upon the licensed premises:
>
> "(1) Employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below



> the top of the aerola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.
>
> "(2) Employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.
>
> "(3) Encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.
>
> "(4) Permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.
>
> "(5) Permit any person to perform acts of or acts which simulate:
>
> "(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which was prohibited by law.
>
> "(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
>
> "(c) The displaying of the pubic hair, anus, vulva or genitals.
>
> "(6) Subject to the provisions of subdivision (5) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.
>
> "(7) Permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"(8) Permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"(9) Permit the showing of film, still pictures, electronic reproduction; or other visual reproduction depicting:

"(a) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

"(c) Scenes wherein a person displays the vulva or the anus or the genitals.

"(d) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above."

That in violation of the above recited conditions and on or about May 16, 1975, appellant did permit an unidentified female dancer, whose first name is known as "Nichole," and is described as follows: female Caucasian, approximately 5'5" tall, 120 pounds, has dark brown hair, and is approximately 25 years old, and Bonnie Lou Dorothy Davis to perform acts in the above designated on-sale licensed premises at which time said persons did display their pubic hair, and did permit said entertainers to expose their breasts, buttocks, and pubic hair to the view of patrons in the above designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least six feet from the nearest patron.

The prior licensing history of appellant alleged that a disciplinary action dated March 21, 1975, was pend-



ing hearing for a violation of section 25607 of the Business and Professions Code and section 647(f) of the Penal Code.

All of the above acts were alleged to be in violation of Article XX, section 22 of the California Constitution and section 24200(a) of the Business and Professions Code as to all counts. It was further alleged that a violation of section 23804 of the Business and Professions Code occurred as to Count IV and that violations of Title 4 of the California Administrative Code rule 143.3(1)(c) occurred as to Counts I and II, and rule 143.3(2) as to Count III.

On or about September 26, 1975, a First Amended Accusation was filed wherein it was alleged that appellant had committed the same violations as alleged in the first Accusation. Said First Amended Accusation further alleged six additional counts which occurred on August 21, 1975, wherein the appellant allowed various performers in the above designated on-sale licensed premises to display their pubic hair, breasts, and buttocks at which time they were on stage not removed at least six feet from the nearest patron. Count X of the First Amended Accusation incorporated the same provisions of Count IV of the first Accusation but further alleged the following acts:

A. On May 16, 1975, did permit an unidentified female dancer, whose first name is known only as "Nichole," and who is described as follows: female Caucasian, approximately 5'5" tall, 120 pounds, has dark brown hair, and is approximately 25 years old, and Bonnie Lou Dorothy Davis to perform acts in the above-designated on-sale licensed premises at which time said entertainers did expose their breasts, buttocks, and pubic hair

to the view of patrons in the above-designated on-sale licensed premises at which time and place said entertainers were not on a stage removed at least six feet from the nearest patron.

B. On August 21, 1975, did permit Patricia Louise Trammell and Kathleen Mary Ryan to perform acts in the above-designated on-sale licensed premises at which time said persons did display their pubic hair, and did permit said entertainers to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises at which time and place said entertainers were not on a stage removed at least six feet from the nearest patron.

C. On August 28, 1975, did permit Patricia Louise Trammell and Joan Irene Gaudet to perform acts in the above-designated on-sale licensed premises at which time said persons did display their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises at which time and place said entertainers were not on a stage removed at least six feet from the nearest patron.

The license history of appellant stated that a disciplinary action was filed on March 21, 1975, for a violation of Business and Professions Code section 25607 and section 647(f) of the Penal Code and was awaiting a decision.

The above acts were alleged to be in violation of Article XX, section 22 of the California Contitution and sections 24200(a) and (b) and 23804 of the Business and Professions Code, and that there were violations of Title 4, California Administrative Code rules 143.3(1)(c) and 143.3(2).



After hearing, the Administrative Law Judge found that:

A. Appellant violated rule 143.3(1)(c) as to Counts I, II, IV, V, VII, and VIII.

B. The appellant violated rule 143.3(2) as to Counts III, VI, and IX.

C. Grounds for the suspension or revocation of appellant's license were established pursuant to subdivisions (a) and (b) of section 24200 of the Business and Professions Code and Article XX, section 22 of the California Constitution as to Counts I through IX.

D. That no cause for discipline was established as to Count X.

The Administrative Law Judge recommended that the license be suspended for 30 days on each Counts I through IX, separately and severally, said suspensions to run concurrently for a total suspension of 30 days. The Administrative Law Judge dismissed Count X. On or about May 20, 1976, the Department of Alcoholic Beverage Control adopted the decision of the Administrative Law Judge. Appellant filed a Notice of Appeal from the decision of the Department of Alcoholic Beverage Control.

On or about March 21, 1976, appellee Alcoholic Beverage Control Appeals Board filed its opinion affirming the order of suspension of the Department of Alcoholic Beverage Control.

Appellant filed a Petition for Writ of Review and Stay in the Court of Appeal of the State of California, Second Appellate District, on April 20, 1977. On April 28, 1977, the petition was denied without opinion. On May 5, 1977, appellant filed a Petition for Writ

of Review and Stay Order in the Supreme Court of the State of California. On May 26, 1977, a hearing on said matter was denied. On or about June 14, 1977, appellee Department of Alcoholic Beverage Control issued an order advising appellant that the Department of Alcoholic Beverage Control would call on him on or after June 24, 1977, to pick up the license certificate inasmuch as the appeals were now final. A copy of the Notice After Appeals Board Decision is attached hereto in the Appendix marked Exhibit "A".

**Statement of the Facts**

John Ellis Schillin, special investigator for the Department of Alcoholic Beverage Control, went to the licensed premises on May 16, 1975, accompanied by Investigator Griffin. Investigator Schillin saw several signs relating to entertainment as follows: "Slick Nick's Saloon, Continuous Dancing, Continuous Entertainment, Beer, Food, Pool;" and outside on the parkway of the premises there was a portable sign that stated, "Exotic Nude Dancing, 5:00 p.m. to 1:00 a.m."

Investigator Schillin arrived at approximately 6:45 p.m. Investigator Schillin was alone when he entered. Investigator Schillin was met by the doorman who requested a $2 admission charge which he paid the doorman. Investigator Schillin then entered the premises and took a seat at the northwest corner of the premises. Approximately 20 patrons were in the premises, 15 of which were seated around the stage. The patrons were observing the dancers on the stage and consuming what appeared to be beer. The doorman plus three bikini-clad waitresses and appellant were present. (R.T. 5-7.)



The stage was approximately 10 by 15 wide and a foot and a half high. There is a bar that separates the patrons from the stage which is approximately two and a half feet wide. There were overhead red dome lights, floodlights over the stage, the stage was well lit. A bikini-clad waitress approached Investigator Schillin at which time he ordered a beer. At that time, there was a dancer on the stage who was totally nude and who was identified as Nichole. Nichole was dancing totally nude; her breasts and pubic area were fully exposed to view. Investigator Schillin observed Nichole dancing for five to ten minutes, at which time she would come within three to six feet of the patrons seated around the stage. After Nichole exited the stage, she was replaced by a bikini-clad dancer who did not remove any of her clothing. (R.T. 7-8.)

After the second dancer left the stage, the first dancer reappeared clad in a mini-skirt and blouse with a black G-string. At the end of the first song, she removed her blouse and mini-skirt, leaving her breasts fully exposed to the patrons' view. She danced in this manner for a few more songs and between the fifth and sixth songs, she went behind a curtained area. She reappeared fully nude with her bare breasts and pubic hair fully exposed to patrons' view. She danced clad in this manner for approximately five more songs and then exited the stage. On approximately five occasions, she came within three to six feet of the patrons that were seated around the stage. She exposed herself for approximately 20 minutes. (R.T. 8-9.)

Another dancer known as Bonnie Lou Dorothy Davis then entered the stage clad in a brown mini-skirt, a

printed blouse, a beige bra, and knee-high boots. At the end of the first song, Davis removed her blouse and at the end of the second song, she removed her bra leaving her breasts fully exposed to patrons' view. Davis danced this way for several songs and then reentered the stage fully nude with the exception of knee-high boots; her bare breasts and pubic hair were fully exposed to view. Davis danced this way for approximately 25 minutes and came within three to six feet of the patrons seated around the stage on approximately seven or eight occasions. (R.T. 9-10.)

At this time, Investigator Barnes and Supervisor Grummell entered the premises and identified themselves to appellant. Investigator Schillin also identified himself to appellant and indicated that he wished to speak to Davis whom he had observed dancing. Appellant escorted Investigator Schillin and Supervisor Grummell to a dressing area at which time Davis related that she was employed by an agency named Foxy Lady located in Fullerton, California. Davis stated that she received $11 per hour to dance nude and that she was paid through the agency or directly by appellant; that she had received instructions from appellant regarding her dancing bottomless and was told not to bend, stoop. squat, kick or touch her body, nor to perform any lewd acts while dancing bottomless. Davis was aware of rule 143 of the Department of Alcoholic Beverage Control, but assumed the premises was aware of it and just followed their instructions. Davis did not believe she was violating the law. Davis additionally stated that she was aware that she was not to go within six feet of the patrons. Supervisor Grummell asked appellant if appellant was aware that permitting



bottomless dancing was in violation of rule 143 and of the conditions of his license. Appellant stated that he was aware of those rules and further stated that his attorney was handling the matter. Investigator Schillin left the premises at approximately 9:10 p.m. (R.T. 10-12.)

Investigator Schillin returned to the premises on August 1, 1975, at approximately 5:40 p.m. Investigator Schillin was accompanied by Investigator Barnes and saw the same signs that he had previously seen. Investigators Schillin and Barnes met appellant at the door and advised appellant that they were conducting an investigation of possible rule 143 violations on appellant's premises. Appellant stated that he would help in any way that he could. The lighting and visibility were the same on this occasion as previously described. Approximately 15 patrons were on the premises, nine of whom were seated around the stage and appeared to be drinking beer. At this time, appellant, the doorman, two waitresses, and a barmaid were present. Investigator Schillin observed two female dancers, Patricia Louise Trammell, who was totally nude, and a Kathleen Mary Ryan clad in a full-length purple gown. Ryan exposed her breasts to the patrons' view, and eventually appeared totally nude. Both women continued dancing for approximately 20 minutes. Then Trammell exited the stage, leaving Ryan alone. Trammell came within approximately three to six feet of the patrons on approximately four occasions, Investigator Schillin asked appellant if he could interview Trammell. Trammell stated that she was employed by the Foxy Lady agency in Fullerton, California, and that she received between $6 and $9 an hour, depending on whether she danced bottomless, topless, or bikini-clad; that she also works

for other places. Trammell had received instructions from appellant regarding her dancing bottomless and was told not to bend, stoop, squat, or kick. Trammell was aware of rule 143 of the Department of Alcoholic Beverage Control, but did not believe that the dancing was in violation of the law. Ryan was also contacted at the end of her performance by Investigator Barnes at which time Investigator Schillin was present. Investigators Barnes and Schillin left the premises at approximately 6:45 p.m. (R.T. 12-16.)

On August 28, 1975, at approximately 6:40 p.m., Investigator Schillin went to the licensed premises again, at which time he saw the same signs as previously described. Investigator Schillin was again accompanied by Investigator Barnes. The lighting and visibility was approximately the same as they were previously described. Investigators Schillin and Barnes informed appellant that they were conducting or continuing the rule 143 investigation. Appellant again stated that he would assist them if he could. Investigators Schillin and Barnes observed Patricia Trammell and Joan Irene Gaudet dancing on the stage totally nude with their bare breasts and pubic hair exposed to view. Gaudet would come within four to six feet of the patrons while she was dancing on approximately four occasions. The performances they saw were substantially the same as what Investigator Schillin had previously seen. Investigator Schillin had an interview with Gaudet who stated that she was employed by the Foxy Lady agency in Fullerton, California, received $32 for each four-and-one-half hour shift, and that she was paid directly by the agency. Gaudet stated that she had the same instructions from appellant, to wit: not to bend, stoop, or squat while dancing bottomless and also that appellant had told her to be totally nude by the end of the sixth song and to remove her G-string behind the curtain on the stage. Gaudet stated that she was aware of the Department of Alcoholic Beverage Control's rule 143, but figured that the premises knew about it and she had just followed the instructions of the premises. After the interview, Investigator Schillin again saw Trammell dancing for approximately ten minutes totally nude. Trammell came within four to six feet of the patrons. Investigator Schillin left the premises at approximately 7:00 p.m. While Investigator Schillin was there, he observed approximately 15 patrons who appeared to be consuming beer. There were also two bikini-clad waitresses and a barmaid. (R.T. 16-20.)



On May 16, 1975, Investigator Schillin had seen Trammell clad only in her black G-string at which time she bent down on the stage in a push-up position and undulated her torso simulating sexual intercourse. To the best of Investigator Schillin's recollection, that was the only time he saw the dancers violate appellant's instructions. At that time only the top portion of Trammell's body and breasts were exposed. Investigator Schillin stated that the entrance fee was approximately $1 on both August 21 and 28, 1975. On May 16, 1975, Investigator Schillin observed Nichole pick up dollar bills at the end of her performance at which time she would bend over to retrieve them. At the conclusion of the performance, Nichole was totally nude, her bare breasts and pubic hair exposed to the patrons' view. Nichole would come within three feet of the patrons. Investigator Schillin also observed Bonnie Lou Dorothy Davis on May 16, 1975, perform the same acts at the end of her performance, except

that she had knee-high boots, but otherwise was totally nude with her bare breasts and pubic hair fully exposed to the patrons' view. Investigator Schillin recalled that four patrons had placed dollar bills on the stage for Davis to retrieve. Davis came within approximately three feet of the patrons. The patrons could lean over the bar counter with their bodies and come close to the stage. The pubic regions of the dancers were at the approximate level of the patrons seated around the stage. (R.T. 26-28.)

Edward J. Grummell, supervising special investigator for the Department of Alcoholic Beverage Control, stated that the records for the licensed premises indicated it had an on-sale beer license known as a type 40. The license was issued on May 24, 1974, and it had continuous conditions placed on it.

Supervisor Grummell entered the licensed premises at approximately 8:45 p.m. on May 16, 1975, with Investigator Barnes. Supervisor Grummell saw Investigators Lloyd Griffin and John Schillin in the licensed premises. Upon entering, Supervisor Grummell identified himself to the doorman and asked to speak to appellant. Appellant was seated on one of the seats facing the stage, at which time a dancer known as Bonnie Louise Davis was dancing nude on the stage. Supervisor Grummell advised appellant that they wished to conduct a rule 143 violation inspection. Supervisor Grummell was then joined by Investigator Schillin who proceeded to interview Davis, while Supervisor Grummell interviewed appellant. Supervisor Grummell asked appellant if appellant was aware of the 143 rules pertaining to bottomless entertainment and the conditions that were placed on his license. Appellant said that he thought he was running a theater. Supervisor



Grummell asked appellant if he felt he was in violation of the conditions placed on his license; appellant said that he discussed it with his attorney who stated that he felt an accusation would be filed against appellant's license because of the activity or entertainment. Supervisor Grummell then asked appellant what instructions he gave to the entertainers. Appellant pointed to a handprinted sign on the wall which gave specific instructions as to what time the dancers were to dance clothed and then nude. Appellant stated that the entertainment started at approximately 5:00 p.m. and that a $2 admission charge was requested if dancers were performing at that time; appellant charged approximately $1.25 for a bottle of beer and $2.50 for a pitcher of beer. Appellant indicated that he hired the dancers through an agency known as the Foxy Lady and at that time hired them for two-and-a-half-hour shifts. Appellant would hire four to six girls per shift and paid $11 per hour to the agency. Appellant would have his own employees, clad in bikini-style outfits, dance during the time the agency girls took their break. Supervisor Grummell left the premises at approximately 9:00 p.m. (A.T. 39-42.)

Lloyd Griffin, special investigator for the Department of Alcoholic Beverage Control, was also at the licensed premises on May 16, 1975. Investigator Griffin entered alone at approximately 6:50 p.m. and observed Investigator Schillin there. Investigator Griffin ordered a beer and paid $1.25 for same. There were approximately 25 patrons at the premises and approximately 15 were seated around the stage area; the others were seated at the bar. The seats around the stage were approximately two to three feet away. The closest Investigator Griffin ever saw a performer on the stage come to

any patron was approximately three feet. At first, Investigator Griffin observed two girls dance in bikini-style bathing suits. After they exited, Investigator Griffin observed two other dancers dance nude exposing their breasts, pubic hair, and buttocks. The closest these dancers would come to the patrons was between three to four feet. Basically, Investigator Griffin described the same activities as the prior witnesses had. Investigator Griffin saw both dancers pick up currency from the stage and bend over completely nude. At this time, one of the dancers would be about three feet from the patrons. Investigator Griffin then called Supervisor Grummell who arrived at the premises with Investigator Barnes at approximately 8:45 to 9:00 p.m. Investigator Griffin left the premises at approximately 9:20 p.m.

Leslie Eugene Barnes, special investigator for the Department of Alcoholic Beverage Control, was in the licensed premises on May 16, 1975, August 21, 1975, and August 28, 1975. Investigator Barnes described the events that occurred in the same manner as had previously been testified to. The chairs which were around the bar next to the stage were approximately two feet from the bottom of the bar counter. The stage is about one foot below the bar counter and extends a portion about to the middle of the counter underneath. Investigator Barnes observed patrons seated in the chairs. On both August 21 and August 28, 1975, Investigator Barnes again observed patrons sitting around the bar and observed dancers exposing their breasts, buttocks, and pubic hair while performing on the stage. On August 21, 1975, Investigator Barnes observed Trammell and Ryan come within three feet of the patrons, walk next to the bar counter



with their shins almost touching the bar counter and grab-hold. On August 28, 1975, Investigator Barnes observed approximately 15 patrons drinking beer and saw Gaudet and Trammell dancing nude on the stage. On approximately 20 occasions, Gaudet came within three feet of the patrons that were seated around the bar counter. Some of the patrons were seated with their elbows on the counter, had their arms on the counter, and were drinking beer. (R.T. 57-64.)

**Defense**

Robert Richard Scott was the proprietor of the licensed premises known as Slick Nick's. The premises had been licensed since May 1974. Since that time, appellant had been presenting entertainment. When appellant first opened he just had bikini dancers for about two months. Appellant started the completely nude entertainment in approximately April 1975. Prior to presenting nude entertainment, appellant installed theater seats, erected a turnstile for admittance, and posted a sign outside stating what type of entertainment there was. The stage around the bar was completely rebuilt with respect to where the customers would sit. The bar was widened to three feet; the seats were installed to measure six feet from the inside of the bar area. At the time they went bottomless, they began to charge an admission fee. It was appellant's intent when making these changes that the operation of the premises would be similar to a theater. Appellant had an entertainment license for 1974 and 1975 issued by the County of Los Angeles. A sheriff brought appellant a copy of a Los Angeles ordinance approximately one week prior to September 19, 1975. Sheriffs had been on the licensed premises from April 1975 to September 1975, during

which time nude entertainment was presented, but no arrests or citations had been issued. Since September 1975, no arrests or citations had been issued. Appellant had given instructions to employees as to their conduct on the premises. (R.T. 75-83.)

Appellant was aware of the Department of Alcoholic Beverage Control's rule against bottomless nude dancing and nude dancing on a licensed premises. Appellant was further aware of the condition on his license. Seats around the bar are approximately eight feet from the edge of the bar. Some of the customers lean forward on the bar with their bodies. Appellant presently offers nude entertainment on the premises. (R.T. 84-85.)



## ARGUMENT

### I

### The Case Is Barred by Mootness

One of the longstanding principles in the law is that the Supreme Court will not give an advisory opinion which cannot affect the litigant. As is evidenced by Exhibit "A" attached hereto, the decision of the Department of Alcoholic Beverage Control (hereinafter sometimes referred to as the "Department") became effective on June 24, 1977. Therefore, it is apparent that this case is barred by the doctrine of mootness.

In *Kletzing v. Young* (D.C. Cir. 1954) 210 F.2d 729, the court held that where a civil service register had expired the case was moot inasmuch as there was no case in controversy. The *Kletzing* court stated at page 730 that, "[T]he legal question appellant seeks to raise may recur in the future does not defeat the defense of mootness. (Citation omitted.)"

Again, in *St. Pierre v. United States* (1943) 319 U.S. 41, 42 [87 L.Ed. 1199, 63 S.Ct. 910] the court held that where a prisoner's sentence was over, there was no longer a subject matter on which the court could operate. The court stated:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. [Citations omitted.] . . ."

The instant case is very similar to the *St. Pierre* case. Since the sentence has been served, in no way can the dates be restored to appellant. Therefore, the case is barred by mootness.

Appellant has a state remedy. If a further action is taken against appellant's license by the Department,

appellant has a remedy before the Alcoholic Beverage Control Appeals Board (hereinafter sometimes referred to as the "Appeals Board") to review the matter before the case becomes final. During the time that the Appeals Board has the case on appeal, there is an automatic stay of the decision. In light of the fact that appellant has a review prior to the case becoming final, it is again submitted that the doctrine of mootness applies. For these reasons, this court should refuse to issue an advisory opinion in this case.

## II
## ABC Rule 143.3 Is Constitutional

As noted by this court in *California v. LaRue* (1972) *supra,* 409 U.S. 109, 110, the Department of Alcoholic Beverage Control is an administrative agency vested by the California Constitution with the authority for the licensing of the sale of alcoholic beverages in California and further has the authority to suspend or revoke any license when the Department determines that its continuation would be contrary to public welfare or morals. Art. XX, § 22 Cal. Const. Further, in the *LaRue* case, this court upheld the validity of rules 143.3 and 143.4.

In *LaRue,* the court specifically discussed the First and Fourteenth Amendments which are also raised in the instant case. This court stated at page 114 that:

> "The state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink. . . .



> "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. . . ."

After a lengthy discussion of the Twenty-first Amendment on page 115, the court in *LaRue* stated that the argument for upholding state regulations in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment.

In citing *United States v. O'Brien* (1968) 391 U.S. 367, 376 [20 L.Ed.2d 672, 88 S.Ct. 1673], this court in *LaRue* further discussed the First and Fourteenth Amendments at length stated:

> " 'We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' " *California v. LaRue, supra,* at pp. 117-18.

The court in *LaRue,* at pages 118-19, stated that:

> "The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that Cali-

fornia has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

". . . But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

"The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution."

These are the very rules that are challenged in this case. This court correctly determined that the state has a legitimate interest in preventing certain conduct from occurring in liquor establishments.

The case of *Craig v. Boren* (1976), 429 U.S. 190, relied on by appellant is inapplicable in this case. In *Craig*, the issue was sex discrimination between females of 18 years of age and males of 21 years of age. Females were allowed to buy 3.2 percent near beer at the age of 18 while males could not do so until they reached the age of 21. Certainly,



this denial of a basic fundamental right to equal protection based on sex and age is held to a higher constitutional equivalent than a performance of nude dancing that is not protected by the First Amendment.

This court held in *Craig*, at page 197, that statutory classifications which distinguished between males and females are subject to scrutiny under the equal protection clause. The court stated:

> "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. . . ."

Certainly, in this case, there is no discrimination as to gender. In fact, this court, in *LaRue*, held that the type of dancing prohibited by these rules is not under the protection of the First Amendment. Thus, *Craig v. Boren, supra,* does not apply in the instant case. Further, this court went on to state that:

> "It is true that California v. LaRue, 409 U.S. 109, 115 (1972), relied upon the Twenty-first Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication,' id., at 118. Nevertheless, the Court has never recognized sufficient 'strength' in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause. . . ." *Craig v. Boren* (1976) *supra*, 429 U.S. 190, 207.

From the above quote in this court's decision in *Craig*, it is clear that this court was reaffirming the

statement in *California v. LaRue* (1972) *supra,* 409 U.S. 109, that the state has authority to regulate live entertainment in liquor establishments under the Twenty-first Amendment where such performances partake more of gross sexuality than of communication. The invidious discrimination apparent in *Craig* is certainly not apparent in this case. The acts prohibited herein are exactly those acts that "partake more of gross sexuality than of communication."

Additionally, there is no denial of the equal protection clause in this instance. All liquor establishments are treated equally and rule 143.3 applies to both males and females. Therefore, no sex-based discrimination can be found in this case.

The *LaRue* court pointed out that the rule (143) focused on the context of licensing bars that sell liquor by the drink, and that the Department had properly concluded that such nude dancing and entertainment cannot take place simultaneously with the consumption of alcoholic beverages. These rules were again upheld in the United States Court of Appeals, Ninth Circuit, in the case of *Richter v. Dept. of Alcoholic Beverage Control* (9th Cir. 1977) 559 F.2d 1168. In *Richter,* the court specifically discussed rule 143.3, which among other things, prohibits the displaying of the pubic hair, anus, vulva, or genital area, and the simulation of intercourse at a liquor establishment. The *Richter* court, at page 1171, cited *Craig v. Boren's* decision and proceeded to distinguish it by stating as follows:

> "However, the language in LaRue, supra, 409 U.S. at 118, 93 S.Ct. at 397, clearly states that the Court did sanction a limitation upon where performances of the type described in the regulation could be held even though it recognized that some of those performances would be within the scope of the First Amendment protections."



The *Richter* court further stated at page 1172 that:

> "Indeed, Mr. Justice Rehnquist, the author of the LaRue opinion, in another case involving regulation of topless dancing, described the holding of LaRue in the following manner:
>
> " 'Although the customary "bar room" type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 U.S. 109, 118, [93 S.Ct. 390, 397, 34 L.Ed.2d 342] (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that *a state could therefore ban such dancing as part of its liquor license program.*' [Emphasis added.]
>
> "Doran v. Salem Inn, Inc., 422 U.S. 922, 932-33, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975). See also opinion of Judge Rehnquist in City of Kenosha v. Bruno, 412 U.S. 507, 515, 93 S.Ct. 2222, 2227, 37 LEd.2d 109 (1973): 'We also held [in California v. LaRue] that regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances were facially constitutional.' "

The *Richter* court went on to fully discuss the First Amendment rights involved. The court stated, at page 1172 that:

> "First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in certain locations, specifically in the context of the commercial exploitation of both the expression delineated in the regulations, which may be protected by the First Amendment, and the sale of liquor, which is within the state's power to control. Nude dancing, as the type performed in appellant's establishment, is not the subject of the prohibition, rather it is the sale of alcoholic beverages."

The *Richter* court concluded by holding that a state could regulate the places where liquor is served on the basis of the type of entertainment provided, so long as the state proceeds in a reasonable manner and has a rational basis for its enactments.

Further, appellant's reliance on the California case of *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 8 [95 Cal.Rptr. 329, 485 P.2d 529] is inapplicable. In *Sail'er Inn* the issue was whether or not females could be barred from being bartenders. This case involved the same invidious sex discrimination as did *Craig v. Boren* (1976) *supra,* 429 U.S. 190. There the California court held that there was no rational basis to exclude females from being bartenders and therefore overturned the Department's rule due to the sex discrimination in employment. However, unlike the *Sail'er Inn* case, if appellant's dancers were to dance within the confines of rule 143, they would be able to pursue their lawful profession. In *Sail'er Inn,* by



the mere fact of being female, a person could not pursue her lawful profession.

The California courts upheld rule 143 in *Locker v. Kirby* (1973) 31 Cal.App.3d 520 [107 Cal.Rptr. 446]; thus the California courts have also continued to correctly uphold this court's decision in *LaRue,* as has this court in *Doran v. Salem Inn, Inc.* (1975) 422 U.S. 922, 932-33 [45 L.Ed.2d 648, 95 S.Ct. 2561, 2568].

**Conclusion**

For the foregoing reasons, the instant appeal should be dismissed.

Respectfully submitted,

EVELLE J. YOUNGER, *Attorney General of the State of California,*

MARILYN K. MAYER,
*Deputy Attorney General,*

*Attorneys for Appellees.*

## EXHIBIT A

### Notice After Appeals Board Decision

Before the Department of Alcoholic Beverage Control of the State of California.

In the Matter of the Accusation Against Robert R. Scott, Slick Nick's Saloon, 13065 E. Valley Blvd., LaPuente, on-sale beer conditional license, respondent under the Alcoholic Beverage Control Act. File 64421, Reg. 3998.

The Alcoholic Beverage Control Appeals Board having affirmed the decision of the Department of Alcoholic Beverage Control in the above matter and the Supreme Court having denied hearing therein, the decision of the Department dated May 20, 1976 is now final.

A representative of the Department will call on you on or after June 24, 1977 to pick up the license certificate.

Sacramento, California

Dated: June 14, 1977

C. E. Cameron, Jr.
C. E. CAMERON, JR.
CHIEF COUNSEL

# In the Supreme Court of the United States



October Term, 1977

No. 77-397

ROBERT R. SCOTT, dba SLICK NICK'S,

*Appellant,*

*vs.*

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

*Appellees.*

77-397

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS

KENNETH P. SCHOLTZ
Attorney at Law
315 South Beverly Drive, Suite 406
Beverly Hills, California 90212
(213) 556-3428 / 879-0157

*Attorney for Appellant*

Westside Law Publishers Santa Monica, California (213) 451-1714

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## TABLE OF AUTHORITIES CITED

### Cases

# In the Supreme Court of the United States

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*Appellees.*

## BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS

This brief is filed in opposition to appellee's motion to affirm or dismiss which was filed on or about November 28, 1977 and which was inadvertently entitled "Brief for the Appellees." It is addressed solely to the issue of mootness, which is a new issue raised for the first time by appellees in their motion.

## I.

## THIS APPEAL IS NOT MOOT BECAUSE THE DECISION COULD HAVE ADVERSE COLLATERAL CONSEQUENCES AND IS PART OF AN ONGOING DISPUTE

Appellees' argument that this appeal is moot because the suspension has been served ignores the collateral consequences which can result from such a final conviction. The California Department of Alcoholic Beverage Control commonly uses prior disciplinary orders that have become final as the basis for enhancement of penalty. An order is considered final only when all judicial review has been exhausted. Thus, if the instant decision is allowed to become final it may be used against appellant in future disciplinary actions before the department. The department could also use it as a basis for denying a future application by appellant for another license.

The law relating to determination of mootness has advanced substantially since *St. Pierre v. United States* (1943) 319 U.S. 41, 63 S. Ct. 910, 87 L.Ed. 1199. The leading case is now *Sibron v. State of New York* (1968) 392 U.S. 40, 88 S. Ct. 1889, in which the development in the law is thoroughly reviewed at pages 50 to 58, and which concludes at page 58 that:

> "A criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."

The substantial collateral consequences of a final decision against appellant have already been noted. This is a direct appeal from a final decision in the highest state court in which review could be sought and should be heard.



Alternatively, this appeal is not moot because it is a part of a continuing controversy which survives the particular suspension of appellant's license. *Abood v. Board of Education* (1977) 97 S. Ct. 1782, 1790. Appellee department has filed a subsequent accusation against appellant, charging violation of the same rules, in which the department seeks to revoke appellant's license, and in which the same constitutional issues will be litigated. Thus, the issues raised in this appeal are of continuing vitality between the parties and are certainly neither advisory nor abstract.

Respectfully submitted,

KENNETH P. SCHOLTZ

*Attorney for Appellant*